

No. 2501

United States
Circuit Court of Appeals

For the Ninth Circuit.

POWER AND IRRIGATION COMPANY OF
CLEAR LAKE, a Corporation, Organized
and Existing Under the Laws of the State of
Arizona,

Appellant,

vs.

L. D. STEPHENS and YOLO WATER AND
POWER COMPANY, a Corporation, Organ-
ized and Existing Under the Laws of the State
of California,

Appellees.

Transcript of Record.

Upon Appeal from the United States District Court
for the Northern District of California,
Second Division.

Filed

NOV 5 - 1914

F. D. Monckton,

Clerk.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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*In the District Court of the United States for the
Northern District of California.*

POWER AND IRRIGATION COMPANY OF
CLEAR LAKE, a Corporation, Organized
and Existing Under the Laws of the State of
Arizona,

Plaintiff,

vs.

L. D. STEPHENS and YOLO WATER AND
POWER COMPANY, a Corporation, Or-
ganized and Existing Under the Laws of the
State of California,

Defendants.

Complaint.

The above-named plaintiff complains of the above-named defendants, and for cause of action alleges:

I.

That the plaintiff now is and ever since the 9th day of April, 1913, has been a corporation duly organized and existing under and by virtue of the laws of the State of Arizona.

II.

That the defendant L. D. Stephens is now, and at all the times hereinafter mentioned has been, a resident and citizen of the State of California.

III.

That the defendant Yolo Water and Power Company now is and ever since the 11th day of December, 1911, has been a corporation duly organized and existing under and by virtue of the laws of the State of California.

IV.

That heretofore and on, to wit, the 10th day of October, 1906, one Mary B. Collier and Wm. B. Collier, her husband, entered into a certain contract of sale with one L. J. Shuman, [1*] which said contract of sale was and is in the words and figures following, to wit:

“San Francisco, California, October 10, 1906.

“In consideration of the sum of Twenty-two hundred (2200) Dollars, gold coin of the United States, the receipt whereof is hereby acknowledged as payment on account of the purchase price herein provided for, MARY B. COLLIER and WILLIAM B. COLLIER, her husband, both of the County of Lake, State of California, hereinafter designated as the Sellers, promise and agree to sell to L. J. SHUMAN of the County of Lake, State of California, or his assigns, hereinafter designated as the Purchaser, for the sum of Twenty-two Thousand Five Hundred (\$22,500.00) Dollars upon the terms and conditions herein mentioned, all that certain real property situate, lying, and being in the County of Lake, State of California and particularly described as follows, to wit:

“FIRST. Lot Seven (7) and the Southwest quarter of the Northeast quarter and the East half of the Northwest quarter of Section 31, in Township fifteen (15) North, Range 9 West, M. D. B. & M.; also the swamp and overflowed lands comprised within Survey Number 26 and all other lands and interest in lands situate in the County of Lake, State

*Page-number appearing at foot of page of original certified Record.

of California, owned or held by the Sellers, excepting, however, a parcel of land particularly described as follows:

“Beginning at the Northeast corner of the Southeast quarter of the Northeast quarter of Section 31, in Township 15 North, Range 9 West, M. D. B. & M. and running thence West six hundred (600) feet; thence at right angles South one hundred and twenty (120) feet; thence at right angles East one hundred (100) feet; thence at right angles South fifty-five (55) feet; thence at right angles East five hundred (500) feet; thence at right angles North one hundred and seventy-five (175) feet to the place of beginning; and also excepting all swamp and overflowed lands now standing in the name of the Sellers and lying between the Northerly and Southerly boundary lines of the excepted parcel just described produced Easterly.

“SECOND. A perpetual right of way sixty (60) feet wide for a road or boulevard over the parcel of land excepted from the operation of this Agreement along the Lake shore; said right of way to be located by the Sellers upon ten (10) days' notice so to do from the Purchaser.

“THIRD. The right to overflow the lands of the Purchaser reserved from the operation of this Agreement to the extent caused by raising the level of Clear Lake a perpendicular distance of seven feet four inches (7' 4'') above the low-water mark established by the United States Government and to maintain the level of said Lake at all seasons of the year a distance of seven feet four inches (7' 4'')

measured perpendicularly above said low-water mark.

“The Sellers agree to furnish an abstract of title complete to date within sixty (60) days after date; the Purchaser is allowed thirty (30) days after receipt of said contract within which to examine title. Objections to title, if any shall be reported to the Sellers, in writing, within said period of thirty (30) days, and if not so reported, shall be deemed to have been waived. The Sellers agree to remove defects rendering [2] the title unmerchantable and specified by the Purchaser in his written report of objections, but if said defects are not removed within sixty (60) days after the receipt of said written report by the Sellers, the Purchaser may at his option insist upon the specific performance of this agreement, extend the time for the removal of said defects, or declare this agreement at an end, in which latter event, the Sellers agree to return to him the sum of money herein receipted for and any further sums paid on account of said purchase price. But if the sale herein provided for is not consummated under the terms and conditions of this agreement, by reason of the failure of the Purchaser to pay the balance of the Purchase price when due as herein provided, then the sums of money paid by the Purchaser on account of the purchase price shall be forfeited and retained by the Sellers as liquidated damages.

“The balance of the purchase price, the sum of Twenty Thousand Two Hundred and Fifty (\$20,250.00) Dollars shall be paid as follows:

“FIRST. The sum of Twenty-two Hundred and

Fifty Dollars shall be paid on or before the second day of January, 1907.

“SECOND. The further sum of Twenty-two Hundred and Fifty (\$2250.00) Dollars shall be paid on or before the second day of April, 1907.

“THIRD. The further sum of Twenty-Two Hundred and Fifty (\$2,250.00) Dollars shall be paid on or before the second day of July, 1907.

“FOURTH. The further sum of Thirteen Thousand Five Hundred (\$13,500.00) Dollars shall be paid on or before the second day of October, 1907.

“The Purchaser promises and agrees to pay interest upon all deferred payments at the rate of six per cent (6%) per annum; interest payments to be made at the same time that the payments on account of the principal are made.

“The Sellers promise and agree concurrently with the payment of the sum of Twenty-two Hundred and Fifty (\$2250.00) Dollars to be paid on or before the second day of July, 1907, to deliver to the Purchaser, or his assigns, a good and sufficient deed of grant, bargain and sale, conveying the property herein above described to said Purchaser or his assigns, free and clear from all liens or incumbrances; provided, however, said Purchaser or his assigns shall at said time make, execute, and deliver to the Sellers his promissory note for the principal sum of Thirteen Thousand Five Hundred (\$13,500.00) Dollars due on or before the second day of October, 1907, as aforesaid, and interest thereon, at the rate of six per cent (6%) per year until paid and a mortgage covering on all of said above described land to

secure the payment of said note.

“The possession of said property is to remain in the Sellers’ hands until the making of the payment of the sum of Twenty-two Hundred and Fifty (\$2250.00) Dollars which is due on or before January 2, 1907, and at said time to be delivered to the purchaser.

“It is distinctly understood and agreed by and between the parties hereto that the Sellers may remove and take the workshop and the three-room cottage now on the premises hereby agreed to be sold.
[3]

“L. J. Shuman agrees to purchase the property above described for the price and upon the terms and conditions herein provided. Time is the essence of this agreement.

“IN WITNESS WHEREOF, the Sellers and Purchaser hereunto set their hands and seals the day and year first above written.

MARY B. COLLIER. (Seal)

WM. B. COLLIER. (Seal)

L. J. SHUMAN. (Seal)

Witness to Wm. B. Collier signature:

FREDERICK E. WARD.

State of California,
County of Lake,—ss.

“On this 10th day of October, A. D. 1906, before me, H. V. Keeling, a Notary Public in and for said County and State residing therein, duly commissioned and sworn, personally appeared Mary B. Collier, personally known to me to be the person described in, and whose name is subscribed to, the

within instrument, and acknowledged to me that she executed the same.

“IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[Seal]

H. V. KEELING,

Notary Public in and for the County of Lake, State of California.”

V.

That thereafter, and prior to the 7th day of May, 1907, said L. J. Shuman, in consideration of Ten Dollars (\$10.00) paid to him by the California Industrial Company, a corporation, organized and then existing under the laws of the State of California, granted, transferred, conveyed, and assigned unto the said California Industrial Company, a corporation, all his rights under the said written instrument hereinabove referred to.

VI.

That thereafter and on the 7th day of May, 1907, the said Mary B. Collier and William B. Collier, her husband, parties of the first part to the written instrument, a copy of which is hereinabove set forth, entered into another and supplemental agreement with the California Industrial Company, a corporation, organized and then existing under and by virtue [4] of the laws of the State of California, which said contract was and is in the words and figures following, to wit:

“WHEREAS, MARY B. COLLIER AND WILLIAM B. COLLIER, her husband, both of Lake County, State of California, did enter into a

certain contract of sale, dated October 10th, 1906, with L. J. SHUMAN, for the sale of the Ranch of said MARY B. COLLIER, situated on the shores of Clear Lake, in said County and State, for the sum of \$22,500.00; a copy of which said contract is hereto attached and made a part hereof;

“AND WHEREAS, the said L. J. SHUMAN has assigned all of his right, title and interest in and to said contract of sale to the CALIFORNIA INDUSTRIAL COMPANY, a California corporation;

“AND WHEREAS, said contract provides that there is reserved to the said MARY B. COLLIER, a certain lot, piece, or parcel of land described as follows, to wit:

“Beginning at the Northeast corner of the Southeast quarter of the Northeast quarter of Section 31 in Township 15 North, Range 9 West, M. D. B. & M. and running thence West six hundred (600) feet; thence at right angles South one hundred and twenty (120) feet; thence at right angles East one hundred (100) feet; thence at right angles South fifty-five (55) feet; thence at right angles East five hundred (500) feet; thence at right angles North one hundred and seventy-five (175) feet to the place of beginning; and also excepting all swamp and overflowed lands now standing in the name of the sellers and lying between the Northerly and Southerly boundary lines of the excepted parcel just described produced easterly.

“AND WHEREAS, the said MARY B. COLLIER did further grant to said SHUMAN, under the terms of said contract, a perpetual right of way

over said reserved land as follows, to wit: Being a perpetual right of way sixty (60) feet wide for a road or boulevard over the parcel of land hereinabove described.

“AND WHEREAS, the said MARY B. COLLIER did also grant to said SHUMAN, under the terms of said contract a right to overflow her said reserved lands with the waters of Clear Lake up to a level of 7 feet, four inches above the United States low-water mark, and which said right of overflow is described therein as follows, to wit:

“The right to overflow the lands of the Purchaser, reserved from the operation of this Agreement to the extent caused by raising the level of Clear Lake, a perpendicular distance of seven feet four inches (7' 4") above the low-water mark established by the United States Government and to maintain the level of said Lake at all seasons of the year a distance of seven feet four inches (7' 4") measured perpendicularly above said low-water mark.

“AND WHEREAS the said MARY B. COLLIER is desirous of reserving to herself more land than the said tract reserved to her as described above;

“NOW, THEREFORE, this agreement WITNESSETH: That for and in consideration of the said CALIFORNIA INDUSTRIAL [5] COMPANY allowing the said MARY B. COLLIER to reserve, in lieu of the said lands above described and reserved to her, the following tract of land situated on Clear Lake, Lake County, California, viz.:

“Beginning at a point on the East line of the Lake

Land Tract, belonging to said Mary B. Collier, South 27.04 chains and East 5.22 chains, from the common Section corner to Sections 29-30-31-32, T. 1 S. N. R. 9 W., M. D. M. and running thence North along the East boundary of said Lake Land Tract 7.04 chains to the Northeast corner thereof, thence West 3.72 chains to a point on the east line of Lot 1 of said Section 32, thence South 31 deg. West along said East line of said Lot 1, 2.91 chains, to a point on the Section Line between said Section 31 and 32, thence North 2.50 chains, to the Northeast corner of Lot 7 of said Section 31, thence West 764 feet, more or less, to a stake on the North boundary line of said lot 7, thence South 53 deg. East 304 feet, more or less, to a stake, thence South 71 deg. 35' East 269.7 feet to a stake on the boulevard survey, being Eng. Station 244+00, thence Southeasterly to the point of beginning;

“The said MARY B. COLLIER and WILLIAM B. COLLIER (her husband) hereby grant to the said CALIFORNIA INDUSTRIAL COMPANY in lieu of the right of way described in the second articles of said contract of sale, a right of way for Boulevard purposes over her reserved lands herein above described, and also over all of her other lands as described in said contract of sale, the said right of way and reserved lands being shown and described on the plat of a survey thereof hereto attached and made a part hereof, and the particular location of said right of way being also shown on the description thereof hereto attached and also made a part hereof.

“The said MARY B. COLLIER and WILLIAM B. COLLIER hereby further grant to the CALIFORNIA INDUSTRIAL COMPANY the right to overflow the lands herein reserved to her and taken in lieu of those reserved under said contract of sale, by raising the waters of Clear Lake, California, to a height or level of nine (9) feet above the United States Government low-water mark on said Lake.

“All of the above grants, rights, and agreements are conditional and depend upon the carrying out of the said contract of sale and the paying to said MARY B. COLLIER all moneys under it as therein specified, fully and completely, time being the essence of this contract.

“It is further agreed between the parties hereto that the said MARY B. COLLIER shall have the right at all times to use the said Boulevard for Boulevard purposes, and that this grant, and its covenants and agreements, shall apply to and bind the heirs, executors, administrators, successors and assigns, of the respective parties hereto.

“IN WITNESS WHEREOF, the said MARY B. COLLIER and WILLIAM B. COLLIER, have hereunto set their hands and seals, and the said CALIFORNIA INDUSTRIAL COMPANY, have executed these presents by its President and Secretary thereunto duly authorized, and has caused its

corporate seal to be attached, this 7th day of May,
A. D. 1907.

MARY B. COLLIER. (Seal)

WILLIAM B. COLLIER. (Seal) [6]

CALIFORNIA INDUSTRIAL COM-
PANY. (Seal)

By T. OTWAY SADLER,
President

And EDWARD O. ALLEN,
Secretary."

"State of California,
City and County of San Francisco,—ss.

On this 11th day of May, in the year of our Lord,
one thousand nine hundred and seven, before me,
FRANK L. OWEN, a Notary Public in and for said
City and County and State, residing therein, duly
commissioned and sworn, personally appeared
WILLIAM B. COLLIER, known to me to be the
person described in and whose name is subscribed to
the within instrument and he acknowledged to me
that he executed the same.

IN WITNESS WHEREOF, I have hereunto set
my hand and affixed my official seal at my office in
the City and County and State aforesaid, the day and
year in this certificate first above written.

[Seal] FRANK L. OWEN,
Notary Public in and for the City and County of
San Francisco, State of California."

"State of California,
County of Lake,—ss.

"On this 7th day of May, in the year one thousand
nine hundred and seven before me, H. W. BREWER,

a Notary Public in and for the County of Lake, personally appeared MARY B. COLLIER known to me to be the same person whose name is subscribed to the within instrument, and who duly acknowledged to me that she executed the same.

“IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal at my office in the County of Lake, the day and year in this certificate first above written.

[Seal] H. W. BREWER,
Notary Public in and for the County of Lake, State
of California.”

That a copy of the aforesaid agreement dated October 10th, 1906, hereinabove set forth, was annexed to the original of the aforesaid agreement of May 7th, 1907.

VII.

That thereafter and prior to the date of the last payment, provided for in the aforesaid contracts, the said California Industrial Company, for a valuable consideration, sold, transferred, assigned and set over the said agreement, and all [7] of its rights thereunder, unto the Central Counties Land Company, a corporation duly organized and then existing under and by virtue of the laws of the State of California.

VIII.

That pursuant to the aforesaid agreements, hereinabove set forth, the said California Industrial Company, and the said Central Counties Land Company, proceeded to and did perform all of the covenants, terms and conditions upon the part of the

said California Industrial Company to be kept and performed, and paid to the said Mary B. Collier and William B. Collier, her husband, the amount of Fifteen thousand five hundred (\$15,500.00) dollars, together with interest amounting to the sum of twelve hundred and fifty (\$1250.00) dollars, or thereabouts.

IX.

That at the time fixed in and by the said contract for the last or final payment thereon, said California Industrial Company and said Central Counties Land Company had paid all of the moneys provided in said agreement to be paid, and all interest due upon deferred payments, save and except the sum of seven thousand (\$7,000.00) dollars.

X.

That on or about the said date, the said Mary B. Collier and William B. Collier, her husband, made and entered into a further agreement with the said Central Counties Land Company, wherein and whereby they covenanted and agreed that the said Central Counties Land Company should have a further extension of time in which to make the said final payment, and wherein and whereby the said Mary B. Collier and William B. Collier, her husband, further agreed that upon receiving the balance of seven thousand (\$7,000.00) dollars, together with interest, they, the said Mary B. Collier, and William B. Collier, [8] her husband, would grant, bargain, sell, and convey all of the said property described and agreed to be conveyed in and by the instruments above referred to, unto the said Central Counties Land Company.

XI.

That thereafter the said Central Counties Land Company applied to the said L. D. Stephens for the loan of seven *thousand* (\$7,000.00), with which to make the said last payment, called for by the said agreements, and the said L. D. Stephens covenanted and agreed, to and with the said Central Counties Land Company, that if the said Central Counties Land Company would cause the said contracts hereinabove set forth, to be assigned to him, that he, the said L. D. Stephens, would pay said balance called for by the said contracts, to the said Mary B. Collier and William B. Collier, her husband, and that he would thereupon take the deed to the properties therein provided for, in his, said L. D. Stephens' own name, and would hold the same as security for the repayment to him, said L. D. Stephens, of the said money so advanced, together with interest thereon; and that thereafter, upon demand, he would convey the said properties to the said Central Counties Land Company, or its assigns, upon receiving from the said Central Counties Land Company, the repayment of the said loan of seven thousand (\$7,000.00) dollars, together with legal interest thereon; and covenanted and agreed that the said Central Counties Land Company should have fifteen (15) days time in which to make such payment, after receiving notice from him, the said L. D. Stephens, that he wished such payment to be made.

That thereupon the said Central Counties Land Company agreed and assented to all of the aforesaid terms of the said L. D. Stephens, and thereupon the

said Central Counties Land Company duly assigned the said contract with the said Mary B. [9] Collier and William B. Collier, her husband, to the said L. D. Stephens, and the said L. D. Stephens thereupon advanced to said Central Counties Land Company and paid to the said Mary B. Collier and William B. Collier, the said sum of seven thousand (\$7,000.00) dollars, and received an instrument in form of a grant, bargain, and sale deed, from the said Mary B. Collier and William B. Collier, her husband, conveying the said property to him, the said L. D. Stephens.

That the said Central Counties Land Company had entered into the possession of all of the properties so agreed to be conveyed to it, under and pursuant to the terms of its agreement with the said Mary B. Collier and William B. Collier, and that at the time of the execution of the said deed by the said Mary B. Collier and William B. Collier, her husband, to the said L. D. Stephens, a tenant of the said Central Counties Land Company was in the possession of the said property. That said tenant did not attorn to the said Stephens, but continued to hold possession thereof, as the tenant of the said Central Counties Land Company, and that at all times thereafter, and until on or about the 1st day of November, 1911, said property continued to be and was in the possession of tenants, who at all times attorned to the said Central Counties Land Company;

XII.

That from time to time, during the said period, the said Central Counties Land Company, paid unto

the said L. D. Stephens divers sums of money, for and on account of the principal and interest due upon the said loan so made by him, the said L. D. Stephens, to the said Central Counties Land Company; that plaintiff is informed and believes, and upon such information and belief, avers, that said sum so paid, as aforesaid, amounted to a total of seven hundred and fifty (\$750.00) dollars, or thereabouts.

That since the said 1st day of November, 1911, the defendants, [10] L. D. Stephens and Yolo Water and Power Company have received and collected the rental from the said property.

XIII.

That on the said 1st day of November, 1911, the said L. D. Stephens was indebted to the said Central Counties Land Company, jointly and severally, with divers other persons upon the unpaid subscription for and on account of six hundred and thirty-three (633) shares of the capital stock of the said Central Counties Land Company, which had been subscribed for by the said Stephens and other persons, jointly, and issued at their joint direction, at seventy-five per cent (75%) of their par value, leaving an amount of twenty-five per cent (25%) thereon, unpaid. That the par value of the said stock was one hundred (\$100.00) dollars per share, and that the total amount so due and owing to the said Central Counties Land Company, its successors and assigns, upon said unpaid subscription was and is the sum of fifteen thousand eight hundred and twenty-five (\$15,825.00) dollars.

XIV.

By the inadvertence of its officers, said Central Counties Land Company failed to pay its license tax due the State of California for the year 1911, and on the 30th day of November, 1911, the charter and right of the said corporation, to do business, were duly declared forfeited, pursuant to the laws of the State of California; that thereupon, the Board of Directors of said corporation, pursuant to law, became vested with all the property and assets of the said Central Counties Land Company, in trust for the creditors and stockholders of the said corporation;

XV.

That thereafter on the 24th day of March, 1912, the said defendant, L. D. Stephens, became indebted to the said Central [11] Counties Land Company, and its former Board of Directors and Board of Trustees, in a sum far in excess of the amount of principal and interest due from said Central Counties Land Company to the said L. D. Stephens, for and on account of the aforesaid loan by said L. D. Stephens to the said Central Counties Land Company; that the said L. D. Stephens has never repaid to the said Central Counties Land Company, or its former Board of Directors, or Board of Trustees, or to their successors or assigns, any part or portion of the amount so due from the said L. D. Stephens to the said Central Counties Land Company, and its former Board of Directors and Board of Trustees.

XVI.

That the said L. D. Stephens has never at any time notified the said Central Counties Land Company, or its former Board of Directors, or Board of

Trustees, or its successors in interest, that he desired payment to be made for said moneys so advanced and loaned by him to the said Central Counties Land Company.

XVII.

That it is equitable and just that there be set off *pro tanto*, as against all claims of the said L. D. Stephens, for and on account of his aforesaid loan and interest, the aforesaid claims of the said corporation, and its said Board of Trustees, to which said claims, plaintiff has succeeded, as hereinafter set forth.

XVIII.

That prior to the commencement of this action, the said Board of Directors of said defunct corporation, Central Counties Land Company, acting as Trustees for the benefit of the Creditors and stockholders of said defunct corporation, duly sold, assigned, transferred and conveyed unto the plaintiff, above named, the aforesaid lands, and the full equitable title thereto [12] has by mesne conveyances become vested in this plaintiff, and that plaintiff is now the lawful owner and holder thereof.

XIX.

That at all times since its incorporation, the defendant, Yolo Water and Power Company, has had full knowledge and notice of all the matters and things hereinabove set forth, affecting the title to the said lands described in aforesaid contracts and deeds.

XX.

That plaintiff is informed and believes, and upon

such information and belief, avers, that the said L. D. Stephens has executed an instrument, purporting to convey the title to said lands, to the defendant, Yolo Water and Power Company, and plaintiff avers that if such transaction has in fact taken place, said defendant, Yolo Water and Power Company is not an innocent purchaser in good faith, or without notice.

XXI.

That plaintiff is ready, able, and willing to pay to the said defendants, any sums of money due and owing to them, or either of them, for or on account of the moneys so loaned to the Central Counties Land Company, by the said defendant, L. D. Stephens, together with interest thereon, and to account to the said defendants for all taxes, if any, which have been paid upon the said properties, but said amount of principal, if any, and of interest, if any, and of taxes, if any, can only be ascertained upon an accounting.

[13]

WHEREFORE, plaintiff prays judgment and decree of this court:

1. That it be ordered, adjudged, and decreed that plaintiff is the owner of all the property herein described, and that plaintiff is entitled to be let into possession forthwith, upon paying to the said defendant, L. D. Stephens, or to his successors or assigns, the sums of money, if any, which, upon an accounting herein, the Court may find and ascertain to be due and owing to the said defendant, L. D. Stephens, or his assigns, for or on account of the transactions hereinabove set forth.

2. That an accounting of the rents, issues, and

profits, of the said property, and of all taxes, paid thereon, and of any and all amounts that may be due from the tenants, or either of them, to the said plaintiff be had. And

3. For such other, further different, or additional relief as is meet in the premises and conformable to equity.

CHARLES S. WHEELER and
JOHN F. BOWIE,

Attorneys for Plaintiff.

HARDING & MONROE,

Of Counsel. [14]

State of California,

City and County of San Francisco,—ss.

H. S. Elliot, being first duly sworn, deposes and says:

That he is the President of Power and Irrigation Company of Clear Lake, plaintiff in the above-entitled action, and that he makes this affidavit in its behalf; that he has read the foregoing complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated on his information and belief, and as to those matters, that he believes it to be true.

H. S. ELLIOT.

Subscribed and sworn to before me this 24th day of April, 1913.

[Seal]

ELLA L. SMITH,

Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Apr. 25, 1913. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [15]

*In the United States District Court for the Northern
District of California.*

No. 15—IN EQUITY.

POWER & IRRIGATION COMPANY OF CLEAR
LAKE, a Corporation,

Plaintiff,

vs.

L. D. STEPHENS and YOLO WATER AND
POWER COMPANY, a Corporation, Or-
ganized and Existing Under the Laws of the
State of California.

Defendants.

Motion to Dismiss Bill of Complaint.

Now come all of the defendants, by their solicitors,
and move the above-named court to dismiss the bill
of complaint in the above-entitled action, upon the
following grounds:

I.

That the facts stated in said bill of complaint are
not sufficient to constitute a valid cause of action in
equity against these defendants, or either or any of
them.

II.

That it appears upon the face of the said bill of
complaint that the cause of action therein attempted
to be set up is barred by the laches of plaintiff and
its assigns.

III.

It appears upon the face of said bill of complaint that the cause of action therein attempted to be set up is barred by the provisions of subdivision 1, of section 337, of the Code of Civil Procedure of the State of California.

IV.

It appears upon the face of the said bill of complaint that the cause of action therein attempted to be set up is barred by the provisions of section 343 of the Code of Civil [16] Procedure of the State of California.

A. E. SHAW,
BERT SCHLESINGER,
S. C. DENSON,
THEODORE A. BELL,
JOHN S. PARTRIDGE,

Solicitors and of Counsel for Defendants,

Receipt of a copy of the within Motion to Dismiss this 10th day of June 1913, is hereby admitted.

CHARLES S. WHEELER and
JOHN F. BOWIE,

Attorneys for Plaintiff.

HARDING & MONROE,

Of Counsel.

[Endorsed]: Filed Jun. 10, 1913. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [17]

*In the District Court of the United States, for the
Northern District of California.*

No. 15—IN EQUITY.

Division 2.

POWER AND IRRIGATION COMPANY OF
CLEAR LAKE, a Corporation Organized and
Existing Under the Laws of the State of Cali-
fornia,

Plaintiff,

vs.

L. D. STEPHENS, and YOLO WATER AND
POWER COMPANY, a Corporation Or-
ganized and Existing Under the Laws of the
State of California.

Defendants.

**Notice of Hearing Motion to Dismiss Bill of
Complaint.**

To the Defendants, and Each of Them, in the Above-
entitled Action, and to Messrs A. E. Shaw, Bert
Schlesinger, S. C. Denson, Theodore A. Bell
and John S. Partridge, their Attorneys:

You, and each of you, will please take notice that
the defendants' Motion to Dismiss the Bill of Com-
plaint in the above-entitled action, will be called for
hearing in the above-entitled court, Division 2, at
the courtroom of said Court in the Postoffice build-
ing, San Francisco, California, on Monday, June 16,
1913, at 10 o'clock A. M.

Dated, June 10, 1913.

CHARLES S. WHEELER and
JOHN F. BOWIE,

Attorneys for Plaintiff.

HARDING & MONROE,
Of Counsel.

Due service and receipt of a copy of the within
Notice this 10th day of June, 1913, is hereby ad-
mitted.

A. E. SHAW,
BERT SCHLESINGER,
JOHN S. PARTRIDGE,
THEODORE A. BELL,
DENSON, COOLEY & DENSON,
S. C. DENSON,

Attorneys for Defendants. [18]

[Endorsed]: Filed Jun. 10, 1913. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [19]

*In the District Court of the United States, in and for
the Northern District of California, Second Di-
vision.*

No. 15—IN EQUITY.

POWER & IRRIGATION COMPANY OF CLEAR
LAKE, a Corporation,

Plaintiff,

vs.

L. D. STEPHENS et al.,

Defendants.

Memorandum Decision on Motion to Dismiss Bill.

CHARLES S. WHEELER and JOHN F.
BOWIE, Attorneys for Plaintiff.

A. E. SHAW, BERT SCHLESINGER, DEN-
SON, COOLEY & DENSON, THEODORE
A. BELL and MASTICK & PARTRIDGE,
Attorneys for Defendants.

The principles applicable here are similar to those applied in *Power and Irrigation Company of Clear Lake et al. vs. Capay Ditch Company et al.* (No. 14), and the motion to dismiss the bill must be granted.

It is so ordered.

March 10th, 1914.

M. T. DOOLING,
Judge.

[Endorsed]: Filed Mar. 10, 1914. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [20]

*In the District Court of the United States, in and for
the Northern District of California, Second Di-
vision.*

No. 14— IN QUITY.

POWER AND IRRIGATION COMPANY OF
CLEAR LAKE, a Corporation,
Plaintiff,

vs.

CAPAY DITCH COMPANY, a Corporation, YOLO
COUNTY CONSOLIDATED WATER COM-
PANY, a Corporation, YOLO WATER AND
POWER COMPANY a Corporation, J. M.
ADAMSON, L. D. STEPHENS, and
JOSEPH CRAIG,
Defendants.

Opinion and Order Dismissing Bill.

CHARLES S. WHEELER and JOHN F.
BOWIE, Attorneys for Plaintiff.

A. E. SHAW, BERT SCHLESINGER, DEN-
SON, COOLEY & DENSON, THEODORE
A. BELL and MASTICK & PARTRIDGE,
Attorneys for Defendants.

The plaintiff is a corporation organized under the laws of the State of Arizona.

The complaint avers that the Central Counties Land Company, a corporation, organized under the laws of the State of California was on November 18th, 1907, the owner of certain lands in Lake County, and on that day borrowed from defendant Capay Ditch Company three several sums of money,

\$5,625.00, \$8,320.75 and \$10,625.00, and executed and delivered to said Ditch Company its three several promissory notes for the said amounts all payable on or before August 1st, 1908. That contemporaneously, and as a part of the same transaction, and solely for the purpose of securing the payment of said notes, the said Central Counties Land Company executed and delivered to said Ditch Company an instrument in writing, in form a grant, bargain and [21] sale deed, but intended as a mortgage, conveying to said Ditch Company the said lands in Lake County; that on December 18th, 1911, the said Ditch Company conveyed said lands to defendant Yolo County Consolidated Water Company, which company thereafter conveyed the said lands to defendants L. D. Stephens and Joseph Craig, who in turn conveyed the same to defendant Yolo Water and Power Company, and that each and all of the defendants named took said conveyances with full knowledge of the real nature of the original deed from the Central Counties Land Company to the Capay Ditch Company; that plaintiff is the successor in interest of said Central Counties Land Company, and all of the title to said lands has by mesne conveyances become and is now vested in plaintiff, and that all of the demands of said Central Counties Land Company against the defendants have been transferred to plaintiff. This action seeks to have the deed to the Capay Ditch Company adjusted a mortgage, and that leave be granted plaintiff to redeem said lands by paying whatever is found to be due to such of the defendants as may be entitled to it. Possession of

the lands is also sought, as well as an accounting of the rents, issues and profits thereof. It is further asked that a receiver be appointed to take charge of said lands and preserve the same, and that defendant Yolo Water and Power Company be enjoined from doing certain contemplated work thereon. A number of other averments of the complaint are omitted from this statement because they have no bearing upon the question to be determined at this time. This question arises upon a motion to dismiss the bill upon several grounds, the one chiefly insisted upon being that the court is without jurisdiction because the suit is one upon a chose in action and as the Central Counties Land Company, because a citizen of this State, could not maintain the action [22] in this court, neither can plaintiff, its successor, do so, although a citizen of another state. This brings up for consideration the following provisions of Section 24 of the Judicial Code:

“No District Court shall have cognizance of any suit * * * * to recover upon any promissory note or other chose in action in favor of any assignee, * * * * unless such suit might have been prosecuted in such court to recover upon said note or other chose in action if no assignment had been made.”

It is strongly urged that this is not a suit upon a chose in action but is a suit to quiet title. However the action may be denominated, it seems quite clear to me, that what is sought here is the enforcement of the original contract between the Central Counties Land Company and the Capay Ditch Company, and

the rights asserted are based wholly thereon.

The Court is asked to declare the instrument, in form a deed, to be a mortgage, and to do this because the parties agreed that it was such. If it were not for this agreement plaintiff would have no cause of action against defendants. This agreement is a chose in action, and this suit being to recover upon it, falls within the terms of Section 24 above quoted, and cannot be maintained.

The motion to dismiss will, therefore, be granted.

March 10th, 1914.

M. T. DOOLING,
Judge.

[Endorsed]: Filed Mar. 10, 1914. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [23]

At a stated term, to wit, the March term, A. D. 1914,
of the District Court of the United States of
America, in and for the Northern District of
California, Second Division, held at the court-
room in the City and County of San Francisco,
on Tuesday, the 10th day of March, in the year
of our Lord one thousand nine hundred and
fourteen. Present: The Honorable MAURICE
T. DOOLING, District Judge.

EQUITY—15.

POWER & IRRIGATION CO. OF CLEAR LAKE

vs.

L. D. STEPHENS et al.

Order Granting Defendants' Motion to Dismiss Bill.

Defendants' motion to dismiss the bill, heretofore heard and submitted, being now fully considered and the Court having filed its opinion thereon, it was ordered that said motion be and the same is hereby granted. [24]

In the District Court of the United States for the Northern District of California, Second Division.

EQUITY—15.

**POWER AND IRRIGATION COMPANY OF
CLEAR LAKE, a Corporation,**
Plaintiff,

vs.

**L. D. STEPHENS, YOLO POWER & WATER
COMPANY, a Corporation, et al.,**
Defendants.

Decree.

This matter came on to be heard on the 24th day of January, 1914, upon a motion made by the defendants to dismiss plaintiff's bill of complaint upon the ground that the above-entitled court is without jurisdiction to hear and determine the said cause; thereupon the said motion was argued by counsel for the respective parties, and submitted to the court for its decision, and all and singular, the premises having been duly considered by the Court, and it appearing that the said Court is without juris-

diction to hear and determine the said cause,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the said bill of complaint and the said cause be and the same are hereby dismissed, and that said defendants recover their costs herein, taxed at the sum of \$5.90.

M. T. DOOLING,
Judge of said Court.

[Endorsed]: Filed and entered March 24, 1914.
Walter B. Maling, Clerk. By J. A. Schaertzer,
Deputy Clerk. [25]

*In the District Court of the United States for the
Northern District of California, Second Di-
vision.*

No. 15.

POWER AND IRRIGATION COMPANY OF
CLEAR LAKE, a Corporation,
Plaintiff,

vs.

L. D. STEPHENS and YOLO WATER AND
POWER COMPANY, a Corporation Organ-
ized and Existing Under the Laws of the State
of California,

Defendants.

**Petition for Order Allowing Appeal and Order
Allowing Appeal.**

To the Honorable Court Above Entitled:

The above-named plaintiff, Power and Irrigation
Company of Clear Lake, a corporation, considering

itself aggrieved by the decree made and entered in the above-entitled court on the 24th day of March, 1914, in the above-entitled cause, hereby appeals therefrom to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, for the reasons and upon the grounds specified in its Assignment of Errors filed herewith, and prays that this appeal may be allowed; and that a transcript of the record, proceedings, and papers upon which said decree was made and entered as aforesaid, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, sitting at San Francisco, California.

And your petitioner further prays that the proper order touching the security to be required of it to perfect its said appeal, be made.

CHARLES S. WHEELER and
JOHN F. BOWIE,

Solicitors for Plaintiff. [26]

Order Allowing Appeal [and Fixing Amount of Bond].

The foregoing Petition for Appeal is hereby granted, and the appeal is allowed, upon the petitioner filing a bond in the sum of Three Hundred Dollars (\$300.00), to be conditioned as required by law.

Dated September 23, 1914.

M. T. DOOLING,
Judge.

[Endorsed]: Filed September 23d, 1914. Walter B. Maling, Clerk. [27]

*In the District Court of the United States, for the
Northern District of California, Second Di-
vision.*

No. 15—EQUITY.

POWER AND IRRIGATION COMPANY OF
CLEAR LAKE, a Corporation,
Plaintiff,

vs.

L. D. STEPHENS, and YOLO WATER AND
POWER COMPANY, a Corporation Organ-
ized and Existing Under the Laws of Califor-
nia,

Defendants.

Assignment of Errors on Appeal.

Now comes the plaintiff in the above-entitled action by its attorneys, Charles S. Wheeler and John F. Bowie, and avers that the decree entered in the above-entitled cause on the 24th day of March, 1914, is erroneous and unjust to the plaintiff, and files with its petition for an appeal from the said decree, the following Assignment of Errors, and specifies that the decree is erroneous in each and every of the following particulars, viz.:

1. The said District Court of the United States for the Northern District of California was not without jurisdiction to hear and determine the said cause, and the order, judgment, and decree of said Court

dismissing said bill for want of jurisdiction is therefore erroneous.

2. The said Court erred in holding that Section 24 of the Judicial Code deprived it of jurisdiction in the above-entitled action, forasmuch as the provisions of said Section 24 are not applicable to the case at bar.

3. The said Court erred in holding that plaintiff's cause of action is based upon a chose in action within the meaning [28] of that phrase as used in Section 24 of the Judicial Code, forasmuch as plaintiff's cause of action is not based on a chose in action within the meaning of the phrase as used in Section 24 of the Judicial Code, but is an action to remove a cloud from title and to redeem from a mortgage.

4. The Court erred in holding that plaintiff is the assignee of a mere chose in action as regards the lands described in the bill, forasmuch as the title to the lands in question is shown by said bill to be presently vested in the plaintiff.

5. The Court erred in holding that the bill seeks the enforcement of the original contract between the Central Counties Land Company and L. D. Stephens, forasmuch as such is not the gravamen of plaintiff's cause of action.

6. The Court erred in holding that the rights asserted in the action are based wholly upon the original contract between the Central Counties Land Company and L. D. Stephens; whereas, the fact is, that the rights and equities relied on in the bill arise out of the circumstances that by mandate of express law no title passed under the indenture set forth in the bill.

WHEREFORE, the plaintiff prays that the said decree be corrected or reversed, and the District Court directed to deny said Motion to Dismiss, or that such other relief be awarded as the nature of the case demands.

CHARLES S. WHEELER and
JOHN F. BOWIE,

Attorneys for Plaintiff.

[Endorsed]: Filed Sept. 23d, 1914. Walter B. Maling, Clerk. [29]

*In the District Court of the United States, for the
Northern District of California, Second Di-
vision.*

No. 15—EQUITY.

POWER AND IRRIGATION COMPANY OF
CLEAR LAKE, a Corporation,
Plaintiff,

vs.

L. D. STEPHENS and YOLO WATER AND
POWER COMPANY, a Corporation Organ-
ized and Existing Under the Laws of Califor-
nia,

Defendants.

Bond on Appeal.

KNOW ALL MEN BY THESE PRESENTS,
That we, Power and Irrigation Company of Clear
Lake, as principal, and Pacific Coast Casualty Co.,
as surety, of the City and County of San Francisco,
State of California, are held firmly bound unto L.
D. Stephens and Yolo Water and Power Company,

a corporation, in the sum of \$300.00 lawful money of the United States, to be paid to them and their respective executors, administrators, and successors and assigns; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and each of our successors and assigns, by these presents.

Sealed with our seals and dated this 23d day of September, 1914.

WHEREAS, the above-named Power and Irrigation Company of Clear Lake has obtained an appeal to the Circuit Court of Appeals of the United States to correct or reverse the decree of the District Court for the Ninth District of California, in the above-entitled cause. [30]

NOW, THEREFORE, the condition of this obligation is such that if the above-named Power and Irrigation Company of Clear Lake shall prosecute its said appeal to effect and answer all costs if it fails to make good its plea, then this obligation shall be void; otherwise to remain in full force and effect.

POWER AND IRRIGATION COMPANY
OF CLEAR LAKE.

By H. S. ELLIOTT,
President.

By R. H. BORLAND,
Secretary.

[Seal Power and Irrigation Co.]

PACIFIC COAST CASUALTY COM-
PANY.

By R. W. STEWART,
Attorney in Fact.

[Seal Pacific Coast Casualty Co.]

Approved September 23d, 1914.

M. T. DOOLING,
Judge.

[Endorsed]: Filed Sept. 23d, 1914. Walter B. Maling, Clerk. [31]

*In the United States District Court for the Northern
District of California, Second Division.*

EQUITY—No. 15.

POWER AND IRRIGATION COMPANY OF
CLEAR LAKE, a Corporation,
Plaintiff,

vs.

L. D. STEPHENS and YOLO WATER AND
POWER COMPANY, a Corporation Organ-
ized and Existing Under the Laws of the State
of California,

Defendants,

Praeipie for Transcript on Appeal.

To the Clerk of Said Court:

Sir: Please make up, print, and issue in the above-entitled cause a certified transcript of the record, upon an appeal allowed in this cause, to the Circuit Court of Appeals of the United States for the Ninth Circuit, sitting at San Francisco, California, the said transcript to include the following:

Bill to Redeem;

Motion to Dismiss Bill of Complaint;

Notice of Hearing Motion to Dismiss Bill of Com-
plaint;

Memorandum Decision;

Opinion of the Court (Dooling, J.) in action No.
14—Equity;

Minute Order of Tuesday, March 10, 1914;

Decree Dismissing Bill;

Petition for Allowance of Appeal, and Order En-
dorsed Thereon;

Assignment of Errors on Appeal;

Citation on Appeal;

Bond on Appeal;

Praceipe for Transcript.

You will please transmit to the Circuit Court of Appeals, [32] with the record to be prepared as above, the Original Citation on Appeal.

CHARLES S. WHEELER and

JOHN F. BOWIE,

Solicitors for Appellant.

Service and receipt of a copy of the within Praecipe this 23d day of September, 1914, is hereby admitted.

MASTICK & PARTRIDGE,

A. E. SHAW,

BERT SCHLESINGER,

DENSON, COOLEY & DENSON,

Attorneys for Defendants.

[Endorsed]: Filed Sep. 23, 1914. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [33]

*In the District Court of the United States, in and
for the Northern District of California.*

No. 15—EQUITY.

POWER AND IRRIGATION COMPANY OF
CLEAR LAKE, a Corporation,

Plaintiff,

vs.

L. D. STEPHENS and YOLO WATER AND
POWER COMPANY, a Corporation, etc.,

Defendants.

Clerk's Certificate to Record on Appeal.

I, Walter B. Maling, Clerk of the District Court of the United States, in and for the Northern District of California, do hereby certify the foregoing thirty-three (33) pages, numbered from 1 to 33, inclusive, to be full, true and correct copies of the records and proceedings as enumerated in the praecipe for transcript of record, as the same remain on file and of record in the above-entitled cause, and that the said constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the cost of the foregoing transcript of record is \$21.80; that said amount was paid by Charles S. Wheeler and John F. Bowie, Esqs., Attorneys for Plaintiff; and that the original Citation issued in said cause is hereto annexed.

In testimony whereof, I have hereunto set my hand and affixed the seal of said District Court, this 21st

day of October, A. D. 1914.

[Seal]

WALTER B. MALING,

Clerk.

By J. A. Schaertzer,

Deputy Clerk. [34]

*In the United States Circuit Court of Appeals for
the Ninth Judicial Circuit.*

POWER AND IRRIGATION COMPANY OF
CLEAR LAKE, a Corporation,

Plaintiff and Appellant,

vs.

L. D. STEPHENS and YOLO WATER AND
POWER COMPANY, a Corporation Organ-
ized and Existing Under the Laws of the State
of California,

Defendants and Appellees.

Citation on Appeal [Original].

United States of America,—ss.

The President of the United States, to L. D.
Stephens and Yolo Water and Power Company,
a Corporation Organized and Existing Under
the Laws of the State of California, Greeting:

You are hereby cited and admonished to be and
appear at a United States Circuit Court of Appeals,
for the Ninth Circuit, to be holden at the City of San
Francisco, in the State of California, on the 22 day
of October, 1914, being within thirty days from the
date hereof, pursuant to an order allowing an appeal,
of record in the clerk's office of the District Court of

the United States for the Northern District of California, in the suit numbered 15, in the records of said court, wherein Power and Irrigation Company of Clear Lake, a corporation, is plaintiff and appellant, and you and each of you are defendants and appellees, to show cause, if any there be, why the decree rendered against the said plaintiff and appellant, as in said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf. [35]

WITNESS, the Honorable M. T. DOOLING,
United States Judge for the Northern District of
California, this 23 day of September, 1914.

M. T. DOOLING,
Judge. [36]

Service and receipt of a copy of the within Citation
this 23d day of September, 1914, is hereby admitted.

MASTICK & PARTRIDGE,
A. E. SHAW,
BERT SCHLESINGER,
DENSON, COOLEY & DENSON,
Attorneys for Defendants.

[Endorsed]: No. 15. In the United States Circuit
Court of Appeals for the Ninth Circuit. Power and
Irrigation Company of Clear Lake, a Corporation,
Plaintiff and Appellant, vs. L. D. Stephens et al.,
Defendants and Appellees. Citation on Appeal:
Filed Sep. 23, 1914. W. B. Maling, Clerk. By J. A.
Schaertzer, Deputy Clerk.

[Endorsed]: No. 2501. United States Circuit Court of Appeals for the Ninth Circuit. Power and Irrigation Company of Clear Lake, a Corporation, Organized and Existing Under the Laws of the State of Arizona, Appellant, vs. L. D. Stephens and Yolo Water and Power Company, a Corporation, Organized and Existing Under the Laws of the State of California, Appellees. Transcript of Record. Upon Appeal from the United States District Court for the Northern District of California, Second Division.

Filed October 21, 1914.

FRANK D. MONCKTON,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

